7.2 ADEA Damages

[Updated: 6/14/02]

Introductory Note

The Supreme Court described the interrelation of the ADEA and other employment discrimination laws in McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) (ADEA) (Kennedy, J.):

> *The ADEA incorporates some features of both Title VII and the Fair Labor Standards Act of 1938, which has led us to describe it as something of a hybrid. The substantive, antidiscrimination provisions of the ADEA are modeled upon the prohibitions of Title VII. Its remedial provisions incorporate by reference the provisions of the Fair Labor Standards Act of 1938. When confronted with a violation of the ADEA, a district court is authorized to afford relief by means of reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees. In the case of a willful violation of the Act, the ADEA authorizes an award of liquidated damages equal to the backpay award. The Act also gives federal courts the discretion to grant such legal or equitable relief as may be appropriate to effectuate the purposes of the Act.*

Id. at 357-58 (citations omitted).

The statute provides the right to a jury trial on the issue of liability and back pay (or other related elements of damages). See 29 U.S.C. 626(c)(2) (2001) ("[A] person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."); see also Kolb v. Goldring, Inc., 694 F.2d 869, 871 (1st Cir. 1982) (ADEA) (Campbell, J.) ("Jury trials of age discrimination claims fall under the contract rubric. The action is for 'amounts owing.'"); Sanchez v. Puerto Rico Oil Co., 37 F.3d 712 (1st Cir. 1994) (ADEA) (Selya, J.) (reviewing jury's award of back pay in ADEA case).

Pattern Jury Instruction

The fact that I instruct you on damages does not represent any view by me that you should or should not find [defendant] liable.

If you find that [defendant] unlawfully discriminated against [plaintiff] on the basis of [her/his] age, then you must determine the amount of damages, if any, that [plaintiff] has sustained up to the date of this trial. You may award [plaintiff] an amount equal to the pay and benefits that [she/he] would have received from [defendant] if the age discrimination had not occurred.[108] You should deduct from this sum whatever wages [plaintiff] has obtained from other employment during this same period, from the date of the discrimination to the date of this trial.

[109]{You may also award [plaintiff] prejudgment interest in an amount that you determine is appropriate to make [her/him] whole and to compensate [her/him] for the time between when [she/he] was injured and the day of your verdict. It is entirely up to you to determine the appropriate rate and amount of any prejudgment interest you decide to award.}

[110]{If you find that [plaintiff] is entitled to damages for losses that will occur in the future, you will have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time, since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost or future damages [plaintiff] will suffer, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.[111]}

[112]{[Plaintiff] has the duty to mitigate [her/his] damages—that is, to take reasonable steps that would reduce the damages. If [she/he] fails to do so, then [she/he] is not entitled to recover any damages that [she/he] could reasonably have avoided incurring. [Defendant] has the burden of proving by a preponderance of the evidence that [plaintiff] failed to take such reasonable steps.}

[113]{[Defendant] contends that it would have made the same decision to [specify adverse action] because [describe the after-discovered misconduct]. If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [specify adverse action] because of [describe the after-discovered misconduct],[114] you should limit any award of damages to the date [defendant] would have made the decision to [specify adverse action] as a result of [the after-discovered misconduct].[115]}

[116]{If you find that [defendant] [specify adverse action] [plaintiff] because of [her/his] age, you must then determine whether [defendant]'s conduct was "willful."[117] "Willful" means that [defendant] either knew that its conduct was prohibited by federal law or showed reckless disregard for the matter. If [defendant] believed, in good faith, that its conduct was legal, then [defendant]'s conduct was not "willful."[118] Under this standard, [plaintiff] need not show that [defendant]'s conduct was outrageous and [she/he] need not show direct evidence of [defendant]'s motivation. As I have said for motive, you may (but do not have to) infer willfulness from the existence of those facts that you find have been proven by a preponderance of the evidence.}

[119]{The age discrimination here was on the part of [identify individual(s)]. You may find that [defendant]'s conduct was "willful" only if you find that [defendant] ratified or authorized [identify individual(s) who discriminated]'s actions or that they committed the wrongful conduct while they were serving in a managerial capacity and were acting within the scope of their employment. Conduct is within the scope of employment if the conduct is the kind of activity the employee was hired to perform and was actuated at least in part by the purpose to serve [defendant].}

[120]{However, if you determine that [defendant] made reasonable, good faith efforts to comply with the federal law forbidding age discrimination, then [defendant]'s conduct was not "willful."[121] In determining the good faith of [defendant], you may consider whether [defendant] instituted policies prohibiting age discrimination, and trained its personnel to ensure equal treatment of its employees, regardless of age. On this issue of good faith, the defendant bears the burden of proof.}

[122]{Causation}

[123]{Nominal Damages}

[124]{Tax Consequences}

I have prepared a special verdict form to assist you in addressing these issues.

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[108] The damages available in an ADEA case include "items of pecuniary or economic loss such as wages, fringe, and other job-related benefits." Kolb v. Goldring, Inc., 694 F.2d 869, 872 (1st Cir. 1982) (ADEA) (Campbell, J.) (citations omitted).

An award of either reinstatement or front pay in lieu of reinstatement is an equitable remedy, and thus within the discretion of the trial court. Kelley v. Airborne Freight Corp., 140 F.3d 335, 354 (1st Cir. 1998) (ADEA) (Stahl, J.) ("Within federal employment discrimination law, front pay is generally an equitable remedy awarded by the court. . . ."); Wildman v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985) (ADEA) (Bownes, J.), cited by Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 121 S. Ct. 1946, 1951 n.1 (2001) (Title VII) (Thomas, J.) ("Future damages should not be awarded unless reinstatement is impracticable or impossible; the district court, then, has discretion to award front pay. Because future damages are often speculative, the district court, in exercising its discretion, should consider the circumstances of the case, including the availability of liquidated damages."). Future economic damages, such as front pay, are only available as a substitute for reinstatement. Kolb, 694 F.2d. at 875 n.4 (Unless a plaintiff seeks reinstatement he or she "cannot . . . recover damages for future economic loss, or 'front pay,' even though the injury continues."); see also Kelley, 140 F.3d at 353 ("Under the ADEA, though the district court has equitable power to award front pay when plaintiff has 'no reasonable prospect of obtaining comparable alternative employment,' future damages should not be awarded unless reinstatement is impracticable or impossible." (citations omitted)).

Non-pecuniary, non-contractual damages such as pain and suffering and punitive damages are not available. Commissioner of Internal Revenue v. Schleier, 515 U.S. 323, 326 & n.2 (1995) (tax case involving ADEA award) (Stevens, J.) (citing Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 112 (1st Cir. 1978) (ADEA) (Bownes, J.)) ("[T]he ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress."); Loeb v. Textron, Inc., 600 F.2d 1003, 1022 (1st Cir. 1979) (ADEA) (Campbell, J.) ("While [the language of the ADEA] is expansive, we have noted previously that it is limited for the most part by the remedies available under the [Fair Labor Standards Act, 29 U.S.C. §§ 216, 217 (2001)], and thus have held that damages for pain and suffering are not available under the FLSA, except to the extent that they are encompassed by liquidated damages." (citations omitted)).

[109] There is some conflict in the caselaw, however, about whether this is a question for the jury or for the court. The First Circuit has generally held that "[t]he decision to award prejudgment interest is within the discretion of the trial court." Criado v. IBM Corp., 145 F.3d 437, 446 (1st Cir. 1998) (ADA) (Godbold, J.); accord Troy v. Bay State Computer Group, Inc., 141 F.3d 378, 383 (1st Cir. 1998) (Title VII) (Boudin, J.); Hogan v. Bangor & Aroostook R.R. Co., 61 F.3d 1034, 1038 (1st Cir. 1995) (ADA) (Lynch, J.); Powers v. Grinnell Corp., 915 F.2d 34, 41 (1st Cir. 1990) (ADEA) (Cyr, J.); Conway v. Electro Switch Corp., 825 F.2d 593, 602 (1st Cir. 1987) (Title VII) (Pettine, Sr. Dist. J., D.R.I.); c.f. Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 648 F.2d 761, 763 (1st Cir.) (sections 1981 and 1983) (Coffin, J.) ("we agree" that "prejudgment interest is required to make injured parties whole when the injuries they suffer are not 'intangible'"), rev'd on other grounds by 454 U.S. 807 (1981). However, in at least one case, the court made this statement even though the trial court submitted the question of prejudgment interest to the jury. Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 960-61 (1st Cir. 1995) (Title VII and

EPA) (Keeton, Dist. J., D. Mass.). In another case, the court implied that prejudgment interest is a jury question, citing the rule that governs prejudgment interest in 1983 cases, see discussion of the rule governing prejudgment interest in section 1983 cases supra note 97: "[P]laintiff did not request prejudgment interest from the jury. He was therefore barred from subsequently seeking it from the judge." Kolb v. Goldring, Inc., 694 F.2d 869, 875 (1st Cir. 1982) (ADEA) (Campbell, J.).

This confusion likely flows from the language of the court's holding in Earnhardt v. Puerto Rico, 744 F.2d 1 (1st Cir. 1984) (Title VII) (Bownes, J.), language that has been cited in most of the subsequent cases to discuss the issue. In Earnhardt, a bench trial where the plaintiff did not request prejudgment interest until he filed a motion to amend the judgment, the First Circuit held (without citation to any other authority):

> The determination of the amount of damages is, absent legal error, a matter for the finder of fact. It cannot be said that either prejudgment interest or an award for lost fringe benefits must, as a matter of law, be part of the damages awarded in a Title VII case. The question of whether they are necessary to make a plaintiff whole is within the discretion of the district court.

Id. at 3.

Considering all of these cases, it appears that an award of prejudgment interest in an ADEA case is within the court's discretion, but the court may exercise that discretion by submitting the question to the jury. This bracketed paragraph may be used in cases where the question of prejudgment interest is submitted to the jury.

Prejudgment interest is not available if the plaintiff is awarded liquidated damages. Powers v. Grinnell Corp., 915 F.2d 34, 41 (1st Cir. 1990) (ADEA) (Cyr, J.).

[110] These bracketed paragraphs may be used in cases where the plaintiff's claimed damages include future losses, such as retirement benefits, that must be reduced to net present value. See Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979) (ADEA) (Campbell, J.) ("any pension benefits due a prevailing plaintiff normally should be liquidated as of the date damages are settled, and should approximate the present discounted value of plaintiff's interest" (internal citation omitted)).

[111] "The discount rate should be based on the rate of interest that would be earned on the 'best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (longshoreman's workers' compensation) (Stevens, J.) (quoting Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916) (Federal Employers' Liability Act) (Pitney, J.)). The "best and safest investments" are those which provide a "risk-free stream of future income," not those made by "investors who are willing to accept some risk of default." Pfeifer, 462 U.S. at 537; Kelly, 241 U.S. at 490-91.

[112] This bracketed paragraph may be used in cases where the plaintiff's duty to mitigate damages is an issue. See Hazel v. U.S. Postmaster Gen., 7 F.3d 1, 5 (1st Cir. 1993) (ADEA and Title VII) (Feinberg, J., 2d Cir.) (holding that plaintiff could not recover, even if he proved discrimination, because he failed to mitigate his damages).

[113] This bracketed paragraph may be used in cases where the defendant argues that it was entitled to take the challenged employment action because of after-acquired information about misconduct by the plaintiff. Although information acquired after the challenged employment action may not be considered when assessing the defendant's liability, it may be relevant to the amount of the plaintiff's damages. See McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-63 (1995) (ADEA) (Kennedy, J.), cited in Equal Employment Opportunity Comm'n v. Amego, Inc., 110 F.3d 135, 146 n.9 (1st Cir. 1997) (ADA) (Lynch, J.); Serafino v. Hasbro, Inc., 82 F.3d 515, 519 (1st Cir. 1996) (Title VII) (Coffin, J.); see also Sabree v. United Bhd. of Carpenters and Joiners Local No. 33, 921 F.2d 396, 404-05 (1st Cir. 1990) (Title VII) (Pettine, Sr. Dist. J., D.R.I.). This bracketed paragraph is not appropriate when the defendant knew of the misconduct in question before it took the challenged employment action. See Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir. 1996) (Title VII) (Selya, J.) (holding affidavits properly admitted where information described in affidavits was known at the time of plaintiff's firing but affidavits were not created until after plaintiff filed suit).

[114] McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362-63 (1995) (ADEA) (Kennedy, J.) ("[A]n employer seek[ing] to rely upon after-acquired evidence of wrongdoing . . . must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.").

[115] The effect of after-acquired evidence of misconduct on the calculation of damages is not precisely defined. In McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-62 (1995) (ADEA) (Kennedy, J.), the Court noted that, "as a general rule . . . neither reinstatement nor front pay is an appropriate remedy," and that "[t]he beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered." The Court added that: "In determining the appropriate

order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party." Id. at 362. We have not resolved how to account for such "extraordinary equitable circumstances" in this jury charge.

[116] The next three bracketed paragraphs may be used in cases where the plaintiff seeks liquidated damages. The plaintiff is entitled to liquidated damages equal to the actual damages if the jury finds that the defendant's conduct was "willful." 29 U.S.C. §§ 216(b), 626(b) (2001). The plaintiff is entitled to liquidated damages equal to the jury's award of back pay and other economic damages. 29 U.S.C. § 216(b). Because the size of the liquidated damages award is non-discretionary, this instruction does not explain why the jury is asked to decide the question of willfulness. See, e.g., Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 716 (1st Cir. 1994) (ADEA) (Selya, J.) (reviewing case where trial court calculated liquidated damages by doubling the jury's back pay award).

[117] "[A] violation is considered willful if 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 721 (1st Cir. 1994) (ADEA) (Selya, J.) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 126 (1985) (ADEA) (Powell, J.)). A plaintiff who receives liquidated damages is not eligible for pre-judgment interest on his or her back pay award. Powers v. Grinnell Corp., 915 F.2d 34, 39-42 (1st Cir. 1990) (ADEA) (Cyr, J.) ("[A]n award of liquidated damages under the ADEA precludes a recovery of prejudgment interest on the back pay award.").

[118] Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 129 (1985) (ADEA) (Powell, J.).

[119] The next two bracketed paragraphs should be used only in vicarious liability cases. For a discussion of vicarious liability and punitive damages in a Title VII, ADA or civil rights case, see notes 137-38.

[120] This bracketed paragraph should only be used in cases where the employee who committed the wrongful conduct was serving in a managerial capacity. In cases where the employer ratified or authorized the discriminatory actions, this defense is not available. See Kolstad v. American Dental Ass'n, 527 U.S. 526, 542-45 (1999) (Title VII) (O'Connor, J.).

[121] Reasonable good faith efforts to conform policies or conduct to the requirements of the ADEA are a defense. Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 721-22 (1st Cir. 1994) (ADEA) (Selya, J.).

[122] This instruction does not include language for use in cases where there is a question as to whether the defendant's conduct caused the plaintiff's injury. In a case where the causal link between the challenged conduct and the claimed damages is disputed factors in the plaintiff's environment caused the emotional distress), it will be necessary to add appropriate causation language.

[123] This instruction does not include a nominal damages charge, because it is not clear in the case law or from the statute whether nominal damages are either authorized or necessary in an ADEA case. No First Circuit case has yet addressed this issue. The language of the statute is broad, and thus could be read to authorize nominal damages, but, because of the nature of the remedies available under the ADEA, it is unlikely that an award of nominal damages would "effectuate the purposes" of the Act. 29 U.S.C. § 626(b) (2001). In other contexts a nominal damages award is given in order to support a corresponding award of punitive damages. But, in an ADEA case the only punitive damages available are liquidated damages, which are automatically calculated by doubling the back pay award. A second reason why a plaintiff might seek nominal damages is to justify an award of attorney's fees. However, this proposition is undermined by the Supreme Court's holding in Farrar v. Hobby, 506 U.S. 103 (1992) (Section 1983) (Thomas, J.), that: "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." Id. at 115 (citations omitted); see also Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331, 339 (1st Cir. 1997) (Title VII) (Selya, J) ("Farrar, then, signifies that fees need not be bestowed if the plaintiff's apparent victory is 'purely technical or de minimis.'" (citing Farrar, 506 U.S. at 117 (O'Connor, J., concurring)); Diver v. Goddard Mem'l Hosp., 783 F.2d 6, 8 (1st Cir. 1986) (Fair Labor Standards Act, 29 U.S.C. 216(b)) (Per Curiam) (holding plaintiff entitled to minimal attorney's fees where plaintiff's degree of success could be "fairly characterized . . . as minimal"). Finally, because these instructions anticipate the use of a jury form with specific questions about culpability and damages, there is no need for a separate nominal damages award to establish a defendant's culpability in cases where the plaintiff has suffered no measurable damages. Therefore, there is no need for a nominal damages provision in this instruction.

[124] Whether the damages a plaintiff recovers are taxable depends on both the statutory source of the recovery and the type of injury the plaintiff sustained, because the federal tax code excludes from taxable income "any damages . . . received . . . on account of personal physical injuries or physical sickness." 26 U.S.C. § 104(a); see also, e.g., O'Gilvie v. United States, 519 U.S. 79 (1996) (tax case; medical malpractice) (Breyer, J.) (punitive damages awards are taxable); Commissioner v. Schleier, 515 U.S. 323 (1995) (tax case; ADEA) (Stevens, J.) (back pay and

liquidated damages awards in ADEA case are both taxable); United States v. Burke, 504 U.S. 229 (1992) (tax case; Title VII) (Blackmun, J.) (before 1991 amendment, Title VII damages were not "tort-like" and thus were taxable); Dotson v. United States, 87 F.3d 682, 685-86 (5th Cir. 1996) (tax case; ERISA) (Dennis, J.) (applying Schleier and Burke in ERISA case); Wulf v. City of Wichita, 883 F.2d 842, 871-75 (10th Cir. 1989) (section 1983) (Anderson, J.) (examining decisions by the Third, Fourth and Ninth circuits); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1579-80 (5th Cir. 1989) (Title VII and section 1983) (Gee, J.) ("The distinction between the § 1983 award and the Title VII award is important for federal income tax purposes."); Thompson v. Commissioner, 866 F.2d 709, 712 (4th Cir. 1989) (Wilkins, J.) (tax case: Title VII and Equal Pay Act). As a general rule, tort-type damages are non-taxable, even if they include damages based on the plaintiff's lost wages, but an award that more closely resembles contract damages, such as an award of back pay, is taxable.

Even after the tax status of each element of a plaintiff's claimed damages is properly established, it is not clear how the tax status of any particular element should affect the final calculation of damages. For example, consider a case involving lost wages. If those wages had been paid properly, they would have been taxed when earned. Therefore, an argument could be made that any award should be reduced to reflect the after-tax value based on the tax rate the plaintiff was subject to in the year in question. On the other hand, an amount the plaintiff receives for those lost wages may be taxable when the plaintiff receives them; thus an argument could be made that the plaintiff's damages should be enhanced so that the he or she actually receives, after taxes, the amount the jury awarded. As a practical matter, these two factors may offset each other, in which case there is no reason to include a jury instruction about the tax consequences of an award. For an example of the difficulty of resolving this issue, see Wulf, 883 F.2d at 873. See also Johnston, 869 F.2d at 1580 ("We decline to require district courts to act as tax consultants every time they grant back pay awards, speculating as to what deductions and shelters the plaintiff will find, and then calculating the plaintiff's potential tax liability.")

This instruction does not attempt to resolve these issue. In a case where the tax consequences of all or part of a damages award are at issue, it will be necessary to supplement the language of this instruction to reflect the particular circumstances of that case.